90-396

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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WILLIAM EDGAR HAWKINS, Petitioner,

vs.

STATE OF ALABAMA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF ALABAMA

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October, 1990

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WILLIE EDGAR HAWKINS, Petitioner,

vs.

STATE OF ALABAMA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF ALABAMA

QUESTION PRESENTED FOR REVIEW

I.

WHETHER A SEARCH AND SEIZURE BASED ON SUSPICION THAT A BURGLARY HAS BEEN COMMITTED WITHOUT ANY ARTICULABLE REASONABLE OBJECTIVE BELIEF PERMITS A SEARCH AND SEIZURE OF A VEHICLE CONTAINING BURGLARY TOOLS FOUND IN A CLOSED CONTAINER IN THE PASSENGER COMPARTMENT RESULTING IN THE PETITIONER'S CONVICTION VIOLATES THE FOURTH AMENDMENT.

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OPINIONS BELOW

During the April Session, 1988 the Mobile County Grand Jury returned an indictment in the Circuit Court of Mobile County, Alabama charging the Petitioner with possession of burglary tools. A Motion by the Petitioner to Suppress the search and seizure of the burglary tools was denied by the Circuit Court on May 22, 1989. The Petitioner and the Respondent stipulated that the State could prove a prima facie case reserving his right to appeal on the issue of the search, seizure, and illegal arrest as tested by his Motion to Suppress. Based on this stipulation, the Defendant was adjudged guilty and sentenced to three years to an Alabama penitentiary on June 23, 1989.

Petitioner appealed his conviction to the Court of Criminal Appeals of Alabama, which affirmed his conviction on February 23, 1990. An Application for Rehearing was filed in the Court of Criminal Appeals of Alabama, which was denied on March 30, 1990. Thereafter, the Petitioner sought review in the Supreme Court of Alabama by Petition for Writ of Certiorari to the Court of Criminal Appeals, which was denied on June 1, 1990.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(3). The Court of Criminal Appeals of Alabama affirmed the Petitioner's conviction on February 23, 1990. A Petition for Rehearing was filed and denied by the Court of Criminal Appeals on March 30, 1990. A Petition for Writ of Certiorari to the Court of Criminal Appeals was sought in the Supreme Court of Alabama, which was denied on June 1, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV, Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

JURISDICTION IN COURT OF FIRST INSTANCE

Jurisdiction in the Court of first instance, the Circuit Court of Mobile, Alabama, is based on violations of Section 13A-7-8, Code of Alabama, 1975, prohibiting possession of burglary tools.

STATEMENT OF THE CASE[1]

The Defendant was charged with possession of burglary tools returned by the Mobile County Grand Jury during the April Session, 1988. (R.5) A Motion to Suppress Evidence was filed on May 17, 1988, seeking to suppress all evidence resulting from the arrest and search and seizure of the Petitioner and the vehicle he occupied. (R.16) The trial court denied the Motion to Suppress. (R.22)

The Petitioner and the State stipulated that the State could prove a prima facie case (R.66) and the trial court thereafter entered findings of guilty (R.68) and sentenced the Defendant to three years in the State penitentiary. (R.70-71)

Bernard Ryan, in October of 1986, was a Special Agent with the FBI and participated in a joint investigation with the Mobile Police Department regarding the interstate transportation of stolen property by members of the "McKinny gang". (Tr.3-4) Ryan received information from the St. Louis FBI office of an investigation of members of the McKinny gang on many burglaries across the southern portion of the United States and transportation of the property to Southern Illinois and Southern Indiana for sale to fences. (Tr.4-5) The FBI office in Mobile received information that Mobile residents Tommy Lynn House and his wife, Cloyce House, were part of the burglary ring. The FBI and the Mobile police department set up a surveillance of the House residence. (Tr.6) The first contact with Cloyce House, the co-defendant of the Petitioner, occurred on December 4, 1986 (Tr.8) when Tommy House was arrested following a stop of his vehicle. Stolen property from several burglaries in Mobile as well as other cities were found in his vehicle as were burglary tools. (Tr.9) Based on the evidence obtained from the vehicle, a search warrant was obtained and as a result of evidence obtained pursuant to the warrant, Cloyce House was charged with possession of stolen property and controlled substances. (Tr.9-10)

The FBI continued its investigation of the McKinney gang and in the course of the investigation more was learned about one member of the gang, the Petitioner. (Tr.11) Ryan was aware that the Petitioner traveled to Mobile prior to and during 1987 (R.13) and was of the opinion that prior to the arrest of Cloyce House the Petitioner traveled to Mobile to pick up Tommy Lynn House for burglary trips. (Tr.14) The Petitioner visited Tommy Lynn House in the Mobile County Jail on October 25, 1987, as evidenced by the Petitioner's signing of a visitor's form. (Tr.14-15)

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1 The Common Law Record will be designated by "R." followed by the page number and the transcript of the report of proceedings will be designated "Tr." followed by the page number.

Ryan received information from two confidential sources that the Petitioner was to travel to Mobile on either February 10 or 11, 1988 to meet with House (Tr.15) and visit with Tommy Lynn House. (Tr.16) According to Ryan, the modus operandi of the group was that two or more people were used to commit the burglaries. (Tr.17) When they arrive in a city, they stay in a hotel in the community next to the city and normally go to the library to find the names of prominent people in the city and telephone or case their residences. (Tr.17) The burglaries are usually carried out during holidays or some festive event such as the Alabama-Auburn football game when no one is home for a specific period of time. (Tr.17)

In the course of carrying out their burglaries, members of the group use police scanners, walkie talkies, gloves, a circular pick for the circular on-and-off switch key and key pick decoders. A call is placed to a residence from a telephone booth, and the telephone is left ringing. One person remains in the booth to monitor the call, while another person enters the residence unlawfully, picks up the telephone, announces he is inside. A lookout, either in a car or on foot, communicates by means of a walkie talkie. Only jewelry and silverware or items which contain gold are removed. Identifiable silver and gold items are melted down. Diamonds and gems are removed and sold separately. (Tr.18) Counter-surveillance methods are used to detect anyone watching or following. If driving, they go slower than average or turn around at a shopping center and check for air surveillance. (Tr.18-19)

Ryan first received information on January 7, 1988 that the Petitioner was planning a trip to Mobile to commit burglaries (Tr.21) On February 8, he received information that the Petitioner was definitely coming to Mobile on February 12 and 13, the Mardi Gras weekend, to commit burglaries. The source of this information had been known to Ryan since October of 1987. (Tr.22) He had verified and corroborated other information received from this source as to the McKinney gang's activities and found the information was correct. (Tr.23)

Thereafter, Ryan checked Cloyce House's residence, and on the morning of February 12, 1988, he observed a Buick vehicle with an Illinois license tag parked at the residence and identified the Defendant.

A surveillance was arranged on the house with Sergeant John Sweatt of the Mobile City Police Department. Ryan learned from his "reliable" confidential sources that the Petitioner, Cloyce House and possibly other members of the gang were going to commit burglaries in wealthy residences during the Mardi Gras balls on Friday night, February 12, and on Saturday night. (Tr.27) At approximately 5:30 p.m. on February 12, Ryan with several FBI agents and several Mobile City Police

Department investigators set up surveillance. At approximately 6:25 p.m., two vehicles left the House residence, a Thunderbird auto driven by Cloyce House with her mother as a passenger, and the Buick driven by the Petitioner. (Tr.27-28) Both cars were followed and drove below the speed limit and the speed of the traffic at the time, sped up occasionally and slowed down. (Tr.29) The cars stopped in a parking lot at a nightclub at approximately 6:45 p.m. (Tr.29) The surveillance team could not go into the parking lot because it was a deadend, but sent a person in to check who reported that the vehicle of Cloyce House, the Thunderbird, was parked but unoccupied. (Tr.29) The Buick was located 15 or 20 minutes later traveling north on a highway, being driven by the mother of House. (Tr.30) The residences in the neighborhood where the mother was driving were wealthy residences and close to the locations where two previous burglaries had been committed. Property from them had been found in the possession of Cloyce House and her husband. (Tr.32)

At 9:15 p.m. the Petitioner's Buick was seen at the Cloyce residence. At 11:45 p.m., five hours after the Thunderbird was parked in the nightclub parking lot, a man was observed entering the automobile and drove it away. Observed in the Thunderbird were the Petitioner and Cloyce House. They drove on various streets and when the surveillance team noticed a Mobile city police unit, the Thunderbird was stopped and the occupants were asked to step out of the car. (Tr.32-35) The search of the vehicle revealed on the front seat of the vehicle a police scanner turned on, and a camouflage nightsack on the floor containing a circular pick, three small hand-held flashlights approximately three inches long, pry bar, pair of tin snips, pair of garden pruners, pair of channel locks, two large flat-headed screwdrivers, small punch, spare batteries, BB's, one CO2 container, two pairs of cotton gloves, two dark colored jumpsuits zipped up in front, and one ski mask. (Tr.35-36)

The items inside the camouflage sack were not open to view until the sack was open. (Tr.44) The surveillance team had no evidence that a burglary had occurred anywhere or that they had seen the Petitioner do anything other than drive a car into the parking lot of the nightclub. (Tr.38-41) They could not give a name or an address that had been burglarized and they had no warrant for the Petitioner's arrest. (Tr.42) The Petitioner was not arrested for burglary, but for the tools found in the night bag in the vehicle. (Tr.58) Ryan simply believed that a burglary had occurred. (Tr.45) The vehicle was stopped because Ryan believed they had probable cause to state a burglary was committed (Tr.38) which was based on the corroboration by the surveillance and they used the same modus operandi as used by the McKinney gang, and one of the two occupants of the car, House, had previously committed a burglary. (Tr.39) Ryan believed they

were in possession of burglary proceeds and burglary tools as on prior occasions. (Tr.49)

FIRST INSTANCE AT WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

The Issue as to whether the Petitioner was subject to an illegal search and seizure without warrant prior to an arrest was first raised in the trial court by a Motion to Suppress the Search, Seizure and Illegal Arrest of the Petitioner. The trial court denied the Motion, entered judgment of conviction pursuant to a stipulation of the parties and sentenced the Defendant. An appeal was presented to the Court of Criminal Appeals of Alabama which was denied on February 23, 1990. A Petition for Rehearing to the Court of Criminal Appeals was denied on March 30, 1990 and a Petition for Certiorari to the Alabama Court of Criminal Appeals was denied by the Supreme Court of Alabama on June 1, 1990.

REASONS FOR THE ALLOWANCE OF THE WRIT

Although the State Court of Alabama relied on certain decisions of their own jurisdiction, these decisions were interpreting Federal decisions and, in fact, the Alabama Court relied upon and interpreted certain decisions of this Court. In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court held that when a State Court decision fairly appears to rest primarily on Federal law, or to be interwoven with Federal law, and when adequacy and independence of any possible State law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the State Court decided the case the way it did because it believed that Federal law required it do so. Therefore, there is no question here that the judgment of the State Court does not rest upon an independent non-federal ground and this Court, therefore, may review the State case.

The Petitioner suggests that this Petition for Writ of Certiorari should be granted because the Alabama Supreme Court has affirmed a decision of its Criminal Court of Appeals as to what constitutes probable cause for police officers to make a warrantless search and seizure of an automobile which is in conflict with the applicable decisions of this Court. Further, the Alabama Supreme Court has allowed to stand a conviction based on search and seizure which we suggest is in conflict with their other decisions which conform to this Court's decisions, thereby denying the Petitioner's due process of law.

This Court has held that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few

specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 357, 88 S.Ct. 5007, 19 L.Ed.2d 576 (1967). Those seeking exemption from the constitutional rule that searches conducted outside judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment must show that exigencies of the situation made that course imperative. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct.Rep. 2022, 2032, 29 L.Ed.2d 564 (1971).

In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court held that a warrantless search of an automobile, stopped by police officers who had probable cause to believe the vehicle contained contraband, was not unreasonable within the meaning of the Fourth Amendment. Thus arose the automobile exception, which permits a warrantless search of a vehicle when two conditions coalesce. First, there must be probable cause to believe that criminal evidence is located in the vehicle and, second, there must be exigent circumstances sufficient to dispense with the need for a warrant. However, the automobile exception doctrine does not convert an automobile to a moving target subject to being stopped on the whim of a police officer.

The issue, put simply, is whether or not the police had probable cause to stop the vehicle in which the Petitioner was an occupant, and seize evidence of burglary tools. In Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1979), the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify search without warrant of a house or office, provided that there is probable cause to believe the automobile contained articles that the officers are entitled to seize. There, the police had knowledge that observers had noticed a blue compact station wagon circling the block in the vicinity of a service station that had been robbed and who saw the station wagon speed away from the parking lot. The observers told the police officers that four men were in the station wagon and one was wearing a green sweater; the service station attendant told the police that one robber was wearing a green sweater and the other was wearing a trench coat. This was deemed sufficient for probable cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater and had a trench coat with him in the automobile.

An investigatory stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1980). See also, Delaware v. Prouse, 440 U.S. 648, 661, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). As was stated in Cortez at page 695, S.Ct.:

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be presented before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person.

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same - and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v. Ohio, supra, said that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment - jurisprudence." (citations omitted) (p.690, S.Ct.)

In United States v. Ross, 456 U.S. 798, 102 S.Ct. N2157, the Court had occasion to consider what is reasonable probable cause. A description, based upon an informant, was given of a person selling narcotics from his vehicle and that his vehicle contained narcotics. His vehicle was stopped, and the Defendant arrested. The vehicle was searched and narcotics were found. The conviction was upheld because the search and seizure was determined to be reasonable. The Court considered the right to free passage in an automobile without interruption or search, unless there is known to a competent official authorized to search, probable cause for believing the vehicles are carrying contraband or illegal merchandise. The Court stated at 808:

> Moreover, the probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. As we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts with a knowledge of the office which in the judgment of the court would make his faith reasonable.
>
> ***
>
> In short, the exception to the warrant requirement established in Carroll - the scope of which we consider in this case - applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant had not actually been obtained.

The Alabama Court's reliance in its opinion on page 8, relying on an Alabama decision quoting Ross, supra, is misplaced. The search in Ross occurred after the Defendant was arrested. Here, the Petitioner was arrested after the bag containing the burglary tools was opened.

Also the Alabama Court of Criminal Appeals in its opinion stated at page 7:

> That even if the stated sources of information alone would have been adequate to supply sufficient probable cause to stop the vehicle and conduct a warrantless search, when they are taken in totality there can be no question that probable cause existed.

The Alabama Court stated that a reasonably prudent person of the officer's experience and training, knowing what the officers knew, would have justifiably believed that a crime had been or was being committed and that the vehicle contained evidence of crime. The Petitioner suggests that the Alabama Court has impermissibly enlarged principles of probable cause as enunciated by this Court to include suspicion that a burglary has taken place or that the vehicle contains burglary tools. Adding several suspicions together does not give rise to an objective standard under the fact of this case. Mere suspicion or a hunch does not give rise to probable cause.

The Petitioner concedes that Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), has overruled the "two-pronged test" under Aguliar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.

637 (1969) and creates a totality of circumstances as to what the officers knew. In Gates, there was an anonymous letter stating that marijuana and other contraband would be found in an automobile and home. Applying the totality of circumstances to the search and seizure of the Petitioner, the totality of the circumstances do not give rise to probable cause to stop and conduct a "Carroll" search. Driving about in a residential area, under suspicion by the police that the Petitioner is a known burglar, a member of a gang and that he has committed a crime does not give probable cause under an objective standard or totality of circumstances to stop the vehicle, much less conduct a search. No objective evidence was known to the police that a crime had been committed.

In Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), the Court held that where officers observed the defendant and another man walking away from one another in an alley, in an area which had a high incidence of drug traffic, but there was no indication that it was unusual for people to be in the alley and an officer was unable to point to any facts supporting his conclusion that the situation in the alley "looked suspicious", circumstances did not justify a reasonable suspicion that the defendant was involved in criminal conduct and, thus, did not warrant detention for questioning and, therefore, since the officer lacked any reasonable suspicion that the defendant was engaged or had engaged in criminal conduct, the detention of the defendant was violative of the Fourth Amendment.

In addition, in Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) in ruling on probable cause, the Court held that an investigatory stop of the defendant could not be based on the mere fact that defendant had preceded another person and occasionally looked backward at him as they proceeded through an airport concourse, notwithstanding the fact that the defendant had arrived from a city that was a principle place of origin of cocaine sold elsewhere in the country, that the defendant had arrived in the early morning, when law enforcement activity was diminished, and the defendant and his companion appeared to be trying to conceal the fact that they were traveling with each other and the defendant and his companion apparently had no luggage other than their shoulder bags. Applying Reid to the instant facts, it would appear that the suspicion here would be invalidated.

The reliance of the Alabama Court of Criminal Appeals on Oliver v. State, 479 So.2d, 1385 (1985), we respectfully suggest is misplaced. In Oliver, a search of the defendant's person and seizure of marijuana from the waistband of the defendant's pants at the time the driver of the vehicle in which he was a passenger was stopped on suspicion that the driver was intoxicated, was justified under the plain view exception to the warrant

requirements. The probable cause to stop the vehicle on suspicion of intoxication was that the vehicle was observed to be driving in an erratic manner. There was no justification for a traffic stop in this instance. Further, in Oliver there was an articulate reason to stop the auto.

The Alabama Court disregarded its holdings in Knight v. State, 346 So.2d 478 (1977) where it was held that probable cause did not exist to arrest the defendant based upon knowledge of the arresting officer who was told by an informer that the defendant had committed a robbery, that the defendant intended to rob a grocery store, that the defendant had not worked while in the city and that he had been spending a lot of money, and where the arresting officer was informed by other officers that they had received information that the defendant was going to rob a grocery store. Further, in Sawyer v. State, 456 So.2d 114, the Court of Criminal Appeals of Alabama held that probable cause to stop the defendant did not exist simply due to association with a drug dealer and since there was nothing in the informant's tip that even concerned defendant, there was no probable cause for a warrantless search. The Alabama Court commented that suspicion alone is not enough to justify probable cause for a warrantless search. Both Knight and Sawyer, supra, followed the decisions of this Court.

In United States v. Ross, supra, the Court stated at page 824, S.Ct., that the scope of a warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the place in which there is probable cause to believe that it may be found. The Court stated just as probable cause to believe that a stolen lawn mower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify search of the entire cab.

However, as stated previously Ross is not applicable because Ross was arrested and then the search and seizure was conducted; the reverse is true here. Then, too, we suggest that the police exceeded the objective of their search. The conviction herein does not pass the scrutiny of Ross.

Lastly, the stop, search and seizure cannot be justified under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 899 (1968), which upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it is unreasonable to deny a police officer the right to neutralize the threat of physical harm, when he possesses an articulable suspicion that an individual is armed and dangerous. In Michigan v. Long, 463 U.S. 1036, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court held that the protective search of the passenger compartment of the defendant's

car was reasonable under the principles articulated in Terry and other decisions of the Court. Although Terry involved the stop and subsequent patdown search for weapons of a person suspected of criminal activity, it did not restrict the preventive search to the person of the detained suspect. Protection of police officers and others can justify protective searches when police have a reasonable belief that the suspect poses a danger. Thus, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief, based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. There are no articulable facts here where the officers believed that the suspect was dangerous, and the search was not a search for weapons.

Considering the totality of the circumstances to establish probable cause, the stop and search for contraband of a burglary when the police had no reasonable beliefe that a crime had been committed, balanced against the intrusion prohibited by the Fourth Amendment, the intrusion should be impermissible. This Court should grant certiorari to define limits of probable cause which make impermissible intrusions based on suspicion and to reverse the conviction of the Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted because the Petitioner's Constitutional rights to be free from unlawful search and seizure and illegal arrest were denied to him.

Respectfully submitted,

WILLIAM EDGAR HAWKINS,
Petitioner

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APPENDIX

	)Grand Jury No. 140
	)CIRCUIT COURT OF
THE STATE OF ALABAMA	)MOBILE COUNTY
Mobile County.	)April Session, 1988
	)

The GRAND JURY of said County charge, that, before the findings of this indictment, William Edgar Hawkins whose name is to the Grand Jury otherwise unknown than as stated, did possess an explosive, tool, instrument, or other article, to-wit; a circular lock pick, pliers, wire cutters, screwdrivers, pry bar and police scanner, which is adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking, with intent to use the same, in the commission of an offense involving forcible entry into premises or theft by a physical taking, in violation of §13A-7-8 of the Code of Alabama, against the peace and dignity of the State of Alabama.

No Prosecutor

Chris N. Galance
District Attorney for the 15th
Judicial Circuit of Alabama
(County of Mobile)

A True Bill

_____
Foreman of the Grand Jury.

Bail fixed in open court at $ _____ this the _____ day of April 1988.

_____ Judge

Presented to the Court by the Foreman of the Grand Jury in the presence of other Grand Jurors.

Filed in open court this the _____ day of April, 1988.

_____
Clerk, Circuit Court, Mobile County, Alabama

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA	*	
	*	
VS.	*	CASE NO.
	*	CC-88-1257
	*	
WILLIAM HAWKINS		

ORDER

This matter is before the Court on defendant's motion to suppress the fruits of a warrantless search of an automobile. The State contends that a warrant was not required because of the existence of exigent circumstances and probable cause. Exigent circumstances are clearly present, so the question is the existence of probable cause.

The law in this area was reviewed recently in the case of White v. State, 495 So.2d 718 (Ala.Cr.App. 1986). The principles involved may be paraphrased as follows: Exigent circumstances do not dispense with the requirement of probable cause, and suspicion alone does not constitute probable cause. In determining probable cause, the totality of circumstances must be examined with a view to the factual and practical considerations "on which reasonable and prudent men, not legal technicians, act." A law enforcement officer may assess the facts in the light of his experience, but must be able to point to specific facts which, with the reasonable inferences therefrom, reasonably warrant the search. The ultimate question is whether such facts "warrant a man of reasonable caution in the belief" that the search was appropriate.

The law enforcement officers in this case, based on the facts at their disposal and on their experience, believed that there was a definite probability that the fruits of, or the tools used in, burglaries were present in the automobile. Probable cause and exigent circumstances being present, a search warrant was not required. Therefore, the motion to suppress is denied.

Dated this 12nd day of May, 1989.

_____

CIRCUIT JUDGE

DEFENDANT STIPULATED IN OPEN COURT THAT STATE COULD PROVE PRIMA FACIE CASE - PRE-SENTENCE INVESTIGATION ORDERED MADE ON DEFENDANT RE-SET FOR SENTENCE

DATE: FRIDAY, MAY 26th, 1989

STATE OF ALABAMA	)Possession of Burglary
Kendall -vs- CC88-1257	)Tools - Defendant
William Edgar Hawkins	)stipulated State could
(White Male - Age)	)prove a prima facie
	)case. Pre-sentence
	)Investigation ordered -
	)Re-set for sentencing -
	)Defendant's attorney,
	)Barry Hess, in court.

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Barry Hess, and the defendant in open court on this day stipulated that the State could prove a prima facie case.

It is ordered and adjudged by the court that a pre-sentence investigation be made on the defendant and this case in hereby re-set for sentencing on June 23rd, 1989.

Thereupon in open court on this day, defendant's attorney, Barry Hess, was in court.

JUDGMENT - SENTENCE - ORAL NOTICE OF APPEAL
EXECUTION OF SENTENCE WITHOUT SUSPENSION OF
SENTENCE PENDING APPEAL
ORDER FIXING AMOUNT OF APPEAL BOND

DATE: FRIDAY, JUNE 23rd 1989

STATE OF ALABAMA	)Possession of Burglary
Kendall vs. CC88-1257	)Tools - Defendant
William Edgar Hawkins	)adjudged guilty -
(White Male - Age)	)Sentenced imprisonment
Grand Jury	)in penitentiary for 3
B.D. 9-30-40	)years under th
	)Habitual Offender Act
	)- Jail Credit - Court
	)Costs and Crime Victim
	)Fund - Notice of Appeal
	)without suspension of
	)sentence pending appeal
	)- Appeal Bond Fixed -
	)Defendant's attorney,
	)Barry Hess, in court.
	)

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney Barry Hess, and the defendant was brought into open court on this day to receive sentence upon a conviction had against him for the offense of Possession of Burglary Tools.

Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied "he had not"; It is therefore considered and adjudged by the court that the defendant is guilty of the offense of Possession of Burglary Tools as charged in the indictment and that the State of Ala-

bama for the use of Mobile County have and recover of the defendant the costs of this prosecution and that the defendant be sentenced to imprisonment in the penitentiary of the State of Alabama for the term of Three (3) years under the Habitual Offender Act.

And thereupon in open court at the time of sentence, the defendant gave notice of appeal, without the suspension of sentence pending appeal.

And it is further ordered and adjudged by the court that the defendant be given credit for 1 day for time spent in jail.

And it is further ordered and adjudged by the court that the defendant pay the costs of court and $25.00 Crime Victim Assessment.

It is further ordered and adjudged by the court that the Appeal Bond in this case be and the same is hereby fixed at $3,000.00.

Thereupon in open court on this day, defendant's attorney, Barry Hess, was in court.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989-90

1 Div. 96

William Edgar Hawkins

v.

State

Appeal from Mobile Circuit Court
(CC-88-1257)

PATTERSON, JUDGE

Appellant, William Edgar Hawkins, was found guilty by a Mobile County Circuit Court of possession of burglary tools, in violation of §13A-7-B, Code of Alabama 1975. Appellant was sentenced, under the Habitual Felony Offender Act, to three years in the State penitentiary.

This appeal rests on the sole contention that the trial court erred in denying appellant's motion to suppress the evidence of the burglary tools which had been seized from the vehicle appellant was driving. Appellant argues that the stop of the vehicle and the subsequent search were not based on probable cause.

The facts presented at the hearing on the motion to suppress are as follows: Bernard Ryan was a former F.B.I. agent in Mobile, Alabama, and, at the time of the incident, was a prosecutor for Cook County, Illinois. In October 1986, while he was a special agent for the F.B.I. in Mobile, he participated in a joint investigation with the Mobile Police Department into the interstate transportation of stolen property by members of the "McKinney gang." Information about the "McKinney gang" was gathered by the St. Louis, Missouri, F.B.I. office as a result of a sting operation and

an investigation and was passed on to the Mobile F.B.I. office. This information linked members of the "McKinney gang" to many burglaries across the southern United States. The Mobile F.B.I. office was also informed that two Mobile residents, Tommy Lynn House and his wife, Cloyce House, were part of this burglary ring. Based upon information obtained from informants throughout 1987, Ryan suspected that appellant was also a member of the burglary ring.

Sometime in February 1988, but prior to February 8, Ryan received additional information, from two confidential sources, that appellant was to travel to Mobile on either February 10 or 11, 1988, to meet with Cloyce House and visit with Tommy Lynn House.

Ryan subsequently learned that appellant had visited Tommy Lynn House in the Mobile County jail on October 25, 1987, as evidenced by appellant's signature and address on a jail visitor's form. After learning this, Ryan contacted one of his two sources and received information that appellant and Cloyce House were planning a burglary spree in Mobile. On February 8, 1988, Ryan again received information, from one of the two informants, that appellant was definitely coming to Mobile on February 12 and 13, 1988, the weekend before Mardi Gras, to Commit burglaries in the wealthy areas of Mobile. Ryan had known these two sources since October 1987.

Ryan was also alerted as to the modus operandi of the "McKinney gang," which consisted of the following: The group uses two or more people to commit burglaries. When they arrive in a city, they check into a hotel adjacent to the area they plan to burglarize. They normally go to the library to find the names of prominent people in the city and then telephone or "case" their residences. The burglaries are usually carried out during holidays or during some festive event. In the course of carrying out the burglaries, the group uses police scanners, walkie-talkies, gloves, a circular pick, and key pick decoders. A call is usually placed to the residence from a telephone booth, and the phone is allowed to ring until one of the burglars enters the residence unlawfully, picks up the telephone, and announces he is inside the house. Only jewelry, silverware, and items of gold are taken.

Based on this above information, the F.B.I. and the Mobile Police Department set up a surveillance of the Houses' residence at 2723 Clubhouse Road. On the morning of February 12, 1988, Ryan saw a brown Buick with an Illinois dealer's tag parked at the Houses' residence and saw a white male in his forties walk out of the residence with Cloyce House, get into her 1977 Ford Thunderbird with her, and then leave in that vehicle. Ryan identified the appellant as the man he saw leaving with Cloyce House.

At approximately 5:30 p.m., on February 12, 1988, Ryan, several F.B.I. agents, and several Mobile Police Department investigators set up surveillance in the area of the Houses' residence. At approximately 6:25 p.m., the two vehicles left the residence. The Thunderbird was occupied by Mrs. House and her mother, Martha Martin; and the brown Buick was driven by appellant. The surveillance team followed the two cars along Dauphin Island Parkway to interstate highway 1-10 and then to 1-65 north. Both cars were driven below the speed limit and below the speed of the traffic, except that occasionally the drivers would speed up and then slow down. They proceeded westbound on Airport Boulevard, until they stopped in the parking lot of the Caligula nightclub at approximately 6:45 p.m.

The surveillance team following the cars could not go into the parking lot, which was a dead end, but sent a person to check. This person reported back that Cloyce House's Thunderbird was parked, but unoccupied. Two men were placed to maintain surveillance on the Thunderbird. The rest of the team attempted to locate the brown Buick, which had disappeared from sight.

The Buick was spotted, 15 or 20 minutes later, traveling north on Hillwood Avenue from Wimbleton Drive. Martha Martin was driving and appeared to be the only occupant in the car at the time. The surveillance team continued watching the car, which traveled in a circular pattern, until it was lost again. It was not found again until 9:15 p.m., parked at the House residence. The neighborhood, where Martha Martin had been driving, consists of wealthy residences and is the same area where two previous burglaries had been committed for which Cloyce House and her husband had been convicted in 1986.

From 9:15 p.m., when the brown Buick car was spotted back at the House residence, fixed surveillance was maintained on the Buick, and surveillance also continued on House's Thunderbird. At approximately 11:45 p.m., some five hours after the Thunderbird, never seen in neighborhood, was first parked in the Caligula parking lot, an F.B.I. agent and a Mobile police officer observed an unidentified man retrieve an article from the right wheel of the Thunderbird, enter the Thunderbird, and drive the vehicle from the parking lot. There appeared to be no one else in the vehicle at this time. The surveillance officers did not identify appellant as the driver, at this time. The driver drove the vehicle northbound on University Drive, then went west on Sunset Drive, stopped, then turned back and returned to University Drive with a second occupant in view. He continued on University Drive to the intersection of University and Airport Boulevard. During this latter surveillance Ryan apparently joined the surveillance team, and he observed appellant driving the vehicle and saw

Cloyce House in the car. Appellant drove through an Arby's restaurant drive-up, then onto Airport Boulevard, to I-65 southbound to I-10, and westbound to Tillman's Corner. Appellant then exited the interstate highway, got back on the interstate immediately, and returned to Dauphin Island Parkway and towards Clubhouse Road.

At the intersection of Dauphin Island Parkway and Clubhouse Road, the Buick was stopped and appellant and Cloyce House were asked to step out of the card. A police scanner, which was operating, was in plain view on the front seat of the vehicle. On the floor of the front seat of the vehicle was a camouflage-colored bag, which was subsequently opened and found to contain a circular lock pick, three small hand-held flashlights approximately three inches long, a pry bar, a pair of tin snips, a pair of garden pruners, a pair of channel locks, two large flat-headed screwdrivers, a small punch, spare batteries, B.B. shot, one carbon dioxide container, two pairs of cotton gloves, two dark jump suits, and one ski mask. All of these items were seized by the Mobile police officers, and appellant was arrested.

Ryan testified that the vehicle was stopped because the police had probable cause based on the following: his information from reliable sources which had been corroborated by the surveillance; the fact that appellant and Cloyce House travelled to the same location using the same known modus operandi as that used by the "McKinney gang"; and the fact that one of the two occupants of the car had previously been convicted of a burglary. The decision to stop the vehicle was a collective decision by Sergeant Sweatt and his supervisor, Lieutenant Stewart, both with the Criminal Investigation Division of the Mobile Police Department. Sweatt also testified that there was probable cause to believe that appellant and Cloyce House had committed a burglary and that this was why the car was stopped and searched without a warrant and why appellant and House were arrested without a warrant. The record indicates that there was no evidence that a burglary had, in fact, occurred or that appellant had been seen doing anything other than driving a car in a very peculiar fashion. Appellant and Cloyce House were not subsequently charged with burglary, but rather with possession of burglary tools

As a general rule, warrantless searches are per se unreasonable as being violative of the Fourth Amendment. Youtz v. State, 494 So.2d 189 (Ala.Cr.App. 1986). However, when the' circumstances of a case give rise to one of the well-documented exceptions to the general rule, a warrantless search may be acceptable. Dale v. State, 466 So.2d 196 (Ala.Cr.App. 1985). One of these exceptions arises when exigent circumstances exist, along with adequate probable cause. This particular exception "authorizes the warrantless search of a vehicle when the police initially have probable

cause to believe that the vehicle contains contraband or evidence of a crime and if exigent circumstances exist." Oliver v. State, 479 So.2d 1385, 1388 (Ala.Cr.App. 1985). "Exigent circumstances exist whenever an object to be searched is mobile or moveable, such as an automobile." Spencer v. Town of Gordo, 389 So.2d 182, 184 (Ala.Cr.App. 1980) (citations omitted).

> "Beginning with the decision in Carroll v. United States, 267 U.S. 132 (1924), the Supreme Court has defined an exception to the Fourth Amendment for automobile searches. The legality of a warrantless automobile search is based on the existence of probable cause to believe that the automobile is carrying contraband subject to forfeiture under the law, and the difficulties of securing a moveable vehicle while a warrant is obtained. It is the suspected contraband on which the analysis focuses and for which this type of warrantless search and seizure is allowed. [citation omitted.]"

United States v. Thomas, 536 F.2d Supp. 736, 742 (M.D. Ala. 1982). The examination of probable cause requires us first to look at the case of Illinois v. Gates, 462 U.S. 213 (1983), where the Supreme Court abandoned the "two-pronged test" established in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969) and readopted the traditional "totality of circumstances" approach to probable cause. See also Dale v. State, 466 So.2d at 199; Walker v. State, 462 So.2d 794 (Ala.Cr.App. 1984); Sawyer v. State, 456 So.2d 114 (Ala.Cr.App. 1982). The test requires this court to look at the facts and judge those facts on the basis of whether a "reasonably prudent man of the officer's experience and training, looking at the 'totality of the circumstances' and the inferences therefrom, would conclude that there is probable cause to believe that the vehicle or the individuals are involved in violating the law." United States v. Thomas, 536 F.2d at 743 (quoting United States v. Ballard, 600 F.2d

1115, 1119 (5th Cir. 1979)). See also Gord v. State, 475 So.2d 900, 903 (Ala.Cr.App. 1985).

Sergeant Sweatt and Lieutenant Stewart were given information by Ryan, a law enforcement officer and former F.B.I. agent with whom they had worked before. Ryan relayed to them that his informants had been reliable in the past. Although Ryan did not give any facts indicating how his informants had obtained their information, confirmation of the information was gained by surveillance, whereby the officers observed such things as appellant's association with a vehicle with an Illinois tag,

his presence in Mobile at the time given by the informers, his visit to the county jail to visit a known member of the "McKinney gang," the erratic driving pattern of appellant, which conformed with the modus operandi of the "McKinney gang," and the presence of a convicted burglar in appellant's car. Moreover, the Buick most driven by appellant was observed being driven by Martin in an area where burglaries had previously been committed within the known modus operandi of the "McKinney gang."

Even if one of the above stated sources of information, alone, would have been inadequate to supply sufficient probable cause to stop the vehicle and conduct a warrantless search, when they are taken in totality there can be no question that probable cause existed. We find that a reasonably prudent person of the officers' experience and training, knowing what the officers knew, would have justifiably believed that a crime had been or was being committed, and that the vehicle contained evidence of crime.

Since there was probable cause to believe that a burglary had been or was being committed and that the Thunderbird contained some evidence of crime, i.e., burglary tools or stolen articles, there was probable cause, coupled with exigent circumstances, to justify a stop of the vehicle and a warrantless search.

Moreover, the search of the camouflage-colored bag was clearly justified.

> "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

Oliver v. State, 479 So.2d at 1388-89 (quoting Ross v. United States, 456 U.S. 798, 823-25 (1982)):

The trial court correctly denied the motion to suppress; therefore, this case is due to be, and it is hereby, affirmed.

AFFIRMED.
ALL JUDGES CONCUR.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205) 242-4590

1st Div. 96 Mobile Circuit Court No. 88-1257

vs.

William Edgar Hawkins
Appellant

State of Alabama
Appellee

Dear Sir or Madam:

You are hereby notified that on March 30, 1990, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.
Judgment not final, see Rules 39 and 41, A.R.A.P.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

Hon. Barry Hess
P.O. Box 1706

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

June 1, 1990

89-1031

Ex parte William Edgar Hawkins

PETITION FOR WRIT OF CERTIOTSTI TO THE COURT OF CRIMINAL APPEALS

(Re: William Edgar Hawkins v. State)

(CRC 1/96 (Mobile CC-88-1257))

ORDER

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

HOUSTON, J. - Hornsby, CJ, Jones, Shores and Kennedy, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 1 day of June, 1990.

Clerk, Supreme Court of Alabama